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July 1, 2011

Corbin R. Davis, Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2011-05

Dear Mr. Davis:

We are submitting these comments to ADM 2011-05 on behalf of the members of the Attorney Discipline Board (ADB), who have had an opportunity to review and discuss these proposed amendments to the Michigan Rules of Professional Conduct. The Board's staff attorneys have also had an opportunity to engage in constructive discussions regarding these proposals with representatives of the Grievance Administrator and the State Bar of Michigan.

The ADB generally endorses the comments submitted on behalf of the Grievance Administrator (GA) and the State Bar of Michigan (SBM) and shares the general concerns which have been articulated. In most cases, the proposed amendments elevate illustrations of existing black letter rules into the rules themselves. This does not always achieve the intended result of clarifying a lawyer's obligation under the rules. While some of the resulting redundancies may be characterized as harmless, a few have the unintended result of creating potential conflict or confusion. Additionally, several of the proposals suggest that a lawyer "should" do or not do something. This would work a fundamental change in the nature of the Michigan Rules of Professional Conduct and would mark a transition from an enforceable code to a document which is, at least in part, aspirational. (See, for example, the proposed amendment to MRPC 8.4.)

For the reasons articulated on behalf of the Grievance Administrator and the State Bar, the Attorney Discipline Board respectfully recommends that the proposed amendments in ADM File 2011-05 not be adopted in their present form. In addition, the ADB offers the following comments:

MRPC 1.1

The proposed addition to MRPC 1.1 is drawn from an illustration of the principle stated in the existing MRPC 1.1 that a lawyer "shall not . . . handle a matter without preparation adequate in the circumstances." Adding to the rule the admonition that a lawyer "should" render no more assistance than is reasonably necessary in the circumstances does at least two things: (1) it raises the question whether this is simply advice from the Court or an enforceable obligation, and (2) seems to suggest that even a specialist who is more than competent to handle a particular matter well, or more completely than is reasonably necessary in the emergency circumstances, may not do so. This is not what the comment suggests. In its context in the comment to MRPC 1.1, the statement about services in emergency situations seems to suggest that a lawyer who ordinarily would not handle a matter may do so in circumstances where a lawyer competent in the field is not available and an emergency exists (e.g., a telecommunications lawyer is called by a client who has

been arrested). In this situation, the lawyer who "does not have the skill ordinarily required" to handle the matter, "may give advice or assistance" but "it should be limited to that reasonably necessary in the circumstances." (See the existing comment to Rule 1.1.)

MRPC 1.2

The proposed amendment to this rule also includes the word "should" and is not necessary. The ADB endorses the GA's recommendation to adopt Model Rule 1.2, modified to include mediation evaluations, as does the current Michigan Rule 1.2(a). The first two sentences of MRPC 1.2(a) are or could be adequately covered in MRPC 1.3.

MRPC 1.3

The ADB endorses the comments of the GA and further notes that the use of the word "preferably" in a set of rules used for the enforcement of a lawyer's professional obligations, though employed in MRPC 1.5, should not be further expanded.

MRPC 1.4(c)

The proposed change is not necessary. The rule affirmatively requires reasonable communication and admits of no exception for the lawyer's self interest.

MRPC 1.5(b)

The ADB agrees with the SBM that the new language is vague and likely to cause confusion. Further, the first sentence may not only conflict with MRPC 1.2(c) but with the trend toward limited scope representations as courts, the public, and lawyers grapple with the reality that "full-service" representation is not always affordable for all litigants. The second sentence is adequately covered by MRPC 1.5(a).

MRPC 1.6(b)(3)

This proposed amendment is not needed. The subject is expressly covered by a specific rule on former clients, MRPC 1.9 (c), which better integrates the relevant rules and states: "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client."

MRPC 1.6(b)(5)

This proposal makes the point that a lawyer's disclosure of confidences when his work or his ethics are questioned in a disciplinary or malpractice case "should be no greater than the lawyer reasonably believes is necessary to vindicate innocence," and that disclosure should be limited to the tribunal and others who need to know it. The rule itself already exempts from the prohibition on disclosure "confidences or secrets *necessary* to establish or collect a fee, or to defend the lawyer . . ." The addition of the following language (modified as shown) – "disclosure ~~should~~ must be made in a manner that limits access to the information to the tribunal or other persons who need to know it" – would add meaningful and enforceable protections in the event a lawyer seeks to publish confidential information in retaliation.

MRPC 1.7(c)(2)

The ADB agrees with the SBM that "the lawyer's own interests" is less confusing than the proposed language and more than adequate to achieve the aims of that rule.

MRPC 1.9(c) and (e)

MRPC 1.0 provides that, "Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process." While the MRPC frequently form the substantive basis for fee requests, disqualification motions, etc., they have never dealt with procedure in a civil or criminal case. The ADB joins the SBM and GA in recommending against adoption of this proposal.

MRPC 1.13

The ADB endorses the comments of the SBM with respect to this proposal.

MRPC 1.15

As noted by the GA and SBM, the proposed added language to Rule 1.15(g) is redundant to Rule 1.15(b)(3). The commentary as written already provides helpful guidance.

MRPC 1.16

The proposal to amend paragraph (a) is drawn from the first sentence of the comment to MRPC 1.16 which provides a helpful statement integrating existing black letter rules. While the ADB has no objection to the proposal, it would point out that the existing MRPC 1.16(a) covers this subject by providing that a lawyer may not accept or remain in a representation "if . . . the representation will result in violation of the Rules of Professional Conduct or other law." The ADB agrees with the comments of the SBM and GA with respect to the balance of the proposal to amend MRPC 1.16.

MRPC 1.17

The ADB supports the positions taken by the GA and SBM and does not object to the rationale for this proposal.

MRPC 3.1

As noted above, transforming the Rules from an enforceable code to a source of advice is no small step. The ADB respectfully recommends that this proposed modification not be adopted.

MRPC 4.1

The proposed language does not address circumstances where silence may be required under other Rules, such as Rule 1.6. The proposed language provides little guidance as to when silence is equivalent to a statement and is an unnecessary departure from Model Rule 4.1.

MRPC 5.2

For the reasons articulated by the GA, the ADB recommends that this proposed amendment not be adopted. Current Rule 5.2 excuses misconduct by a subordinate lawyer only when (1) there is an "arguable question of professional duty" that is (2) the subject of a "reasonable resolution."

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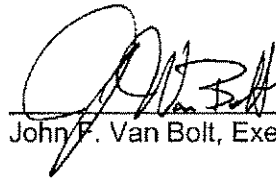
A command by a supervising lawyer to shred documentary evidence or take a client's trust funds does not and should not provide the junior lawyer comfort nor should the subordinate lawyer be relieved of the obligation to exercise independent ethical judgment. Indeed, the subordinate lawyer may have a duty to report a clear violation of the Rules, MRPC 8.3.

MRPC 8.4

The ADB joins the GA and SBM in recommending that this aspirational language not be incorporated in the Rule.

Thank you for the opportunity to address these proposals.

Respectfully submitted,



John F. Van Bolt, Executive Director



Mark A. Armitage, Deputy Director

cc: Anne Boomer, Administrative Counsel, MSC
Janet Welch, Executive Director, SBM
Dawn Evans, Director of Professional Standards, SBM
Robert Agacinski, Grievance Administrator
Cynthia Bullington, Assistant Deputy Administrator